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Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 1317

CHARLES FRANCIS DENARVAEZ, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1968

No. .....B.....

CHARLES FRANCIS DENARVAEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Second Circuit affirming a judgment of conviction, entered in the above cause on January 28, 1969, and the order of said Court demanding a petition for rehearing, entered April 23, 1969.

Opinion Below

First: The opinion of the United States Court of Appeals is unreported and is contained in the Appendix, as is the order of said Court denying rehearing. There was no opinion written by the District Court.

Second: The judgment of conviction sought to be reviewed was entered on May 16, 1968, by the District Court and affirmed by the Court of Appeals on January 28, 1969; order denying petition for rehearing (Judge Hays dissenting) was entered April 23, 1969.

Jurisdiction to review in the manner sought herein is conferred upon this Court by 28 U.S.C. Section 1254(1).

Third: The questions presented for review are as follows:

A. Whether, in a criminal case in which knowledge of a Selective Service order is an indispensable requisite to guilty violation of such order, receipt of such knowledge may be presumed from the mere proof of posting of such order by ordinary mail.

B. Whether, if a presumption of receipt may be made in the usual case, this presumption may be invoked where there is uncontradicted evidence that the addressee not only did not reside at the address to which the Selective Service order was sent, but was in fact out of the country when each notice was mailed and when it was likely to have reached the address to which directed.

C. Whether defendant's testimony, that he received none of the orders upon which his conviction was based, which is not contradicted by any testimonial or documentary evidence, and which is corroborated by evidence that he did not reside at the addresses to which such Notices were sent at the time they were sent, may be disregarded by the Trial Court upon the ground that he did not believe the defendant; and if so, whether his subjective "disbelief" in defendant's testimony may constitutionally substitute for affirmative evidence that defendant in fact received such orders.

D. Whether defendant's failure to keep the Selective Service Board informed of a current address at which he could be reached, which failure is itself an indictable offense, can serve as the basis for a finding that sufficient evidence of wilful disobedience to Draft Board orders exists, without proof of receipt

of such orders, from mere mailings of orders addressed to defendant at addresses on file.

E. Whether a Selective Service Board classification of a registrant into 1-A is sufficient authorization for a Draft Board clerk to send Notices for a physical examination, and for induction, to a registrant; and whether the sending of such Notices is a mere ministerial act requiring no further judgment or order of the Draft Board; or whether a specific order of the members of the Draft Board, directing the examination, or directing the induction, is necessary, in order to make a violation of such order a criminal act.

F. Whether the conviction of this defendant was based on proof beyond a reasonable doubt of his knowingly and willfully violating a lawful order of a Selective Service Board.

G. Whether the Trial Court and the Court of Appeals ignored the standards set forth by this Court in *Venus* v. *U.S.*, 368 U.S. 345, 82 S. Ct. 384, and *Ward* v. *U.S.*, 344 U.S. 924, 73 S. Ct. 494.

Fourth: The relevant statutory section is Title 50 Appendix, U.S. Code, Section 462(a). The relevant regulations involved are 32 Code of Federal Regulations 1628.16 and 32 Code of Federal Regulations 1632.14. The pertinent texts will be set forth in an Appendix.

Statement of the Case

Fifth: Petitioner was convicted of violation of the Universal Military Training and Service Act on two counts, to wit, that he failed to appear for a physical examination on April 3, 1962, pursuant to Notice mailed to him to do so; and that he failed to appear for induction on February

13, 1963, pursuant to Notice mailed to him to do so. He was tried without a jury. The first Count of the indictment (charging him with failing to report for a physical examination on March 6, 1962) was dismissed by the Trial Court. He was sentenced to six months' imprisonment on one Count, and to 18 months imprisonment on the other, but execution of the latter sentence was suspended, and he was placed on an 18 month probation period to begin at the expiration of the prison term. The judgment of conviction was entered May 16, 1968. The Trial Court's judgment was affirmed by a panel of the Court of Appeals for the Second Circuit on January 28, 1969; that same panel (Judge Paul R. Hays dissenting) denied a petition for rehearing on April 23, 1969. Petitioner's release on $5,000 bail was authorized by the Trial Court pending appeal; and a motion is presently pending before the Court of Appeals to stay its mandate pending this petition for a writ of certiorari, to allow petitioner to remain free on bail until such time as this Court has acted upon this petition.

Petitioner was born in the United States in 1937. His father was a Colombian national his mother an American citizen; he thus had dual nationality at birth. He was taken to Colombia by his parents when he was two months old, and did not return to the United States until he came here for school in 1955, when he was just under 18 years of age. He registered under the Selective Service laws at his eighteenth birthday, and throughout high school and college, kept his Local Board informed of all his movements until his graduation in January 1962. After his graduation, his Draft Board reclassified him to 1-A. On February 23rd, a notice was sent to his last known address at Pelham, New York, to report for physical examination on March 6, 1962. In February 1962, his parents then lived in Pelham, New York, and advised him of the letter; under date March 3, 1962, the petitioner sent a handwritten letter to his local Draft Board saying that he was out of the United States

visiting relatives in Bogota, Columbia, and that he planned to remain another three weeks. He requested an extension of the date for his examination "until I get back to the United States". The letter added that upon his return to America, he would be living at 260 Navarre Avenue in Coral Gables, Florida. Count I of the indictment, which was dismissed by the Trial Court, charged him with knowing failure to report for physical examination on March 6, 1962; under the circumstances just described, the Trial Court did not believe that a "knowing" failure to report had been made out by the Government.

The Draft Board's next "order" (and whenever reference is made to a Draft Board "order", it means in this context a Notice sent by a *clerk* of the Draft Board, on the clerk's own initiative, and not by virtue of any order of the Local Board after meeting and voting) was mailed March 22, 1962, to 260 Navarre Avenue, Coral Gables; it instructed defendant to appear for a physical examination on April 3, 1962.

Count II of the indictment, on which he was convicted, charged him with disobeying that order.

However, the uncontradicted fact is that petitioner was then still outside the United States; he did not return until April 14, 1962, which was six weeks from his letter of March 3rd, rather than three weeks later, as he had written to the Draft Board. The petitioner concededly was out of the country *until 11 days after the date he was supposed to appear for physical examination.* As he was out of the country when the notification to appear for physical examination was mailed, he could not have been at the address to which the notification was mailed.

When petitioner returned to the United States on April 14th, he stayed only 9 days, until April 23, 1962; the record

does not show where he stayed during that 9 day period, for neither prosecution nor defense counsel asked him that question. There is no evidence in the record to indicate that petitioner ever even visited 260 Navarre Avenue in Coral Gables. If he visited it at all during that 9 day period, beginning April 14, there is no basis for supposing that the letter of March 22nd was waiting there for him. There is not a scintilla of evidence that the letter ever came to his possession or to his notice prior to April 3, 1962, the date he was to report for physical examination; yet for his failure to appear he has been sentenced to jail.

From the time of his departure April 23, 1962, following his nine day visit, petitioner remained outside the United States continuously until 1966.

So with respect to Count III, on which petitioner has been convicted (failure to report for induction on February 13, 1963); he was out of the United States when notification to report for induction was mailed on January 18, 1963. More than that: *the notice of January 18, 1963 was knowingly sent by a Draft Board clerk to an address at Pelham, New York, which the clerk well knew, and which the Draft Board records showed, was no longer the address where either petitioner or his family resided.*

Thus, the petitioner's conviction is based upon Notices which were sent to American addresses when he was not in America; which were sent to addresses as to which there is no evidence that anyone there resided who would likely give him notification of the receipt of any letter; and with respect to Count III (knowing failure to report for induction), which was sent to an address which the Draft Board *knew* was not his—but to which the Board's clerk sent it *because she did not know of any other address to which to send the Notice.*

Basis for Federal Jurisdiction

Sixth: The federal statute which formed the basis for the indictment; conviction for which review is sought herein, was the United States Universal Military Training & Service Act.

Reasons for Allowing the Writ

A. The Universal Military Training & Service Act applies to tens of millions of Americans. The standard procedure of notification to a registrant, of every instruction of every Local Board, is to send in the mail an unregistered letter. This method of notification applies to everything from the sending of a Questionnaire, or the responding to an inquiry, all the way to orders to report for induction (violation of which can result in criminal conviction). The statute requires that the neglect of the registrant's duty shall be done "knowingly" in order for criminal sanctions to follow. This court in two cases held that the statute's requirement, that the disobedience be knowing, means that the Government must prove "deliberate purpose" to violate a duty. (*Venus* v. *U.S.*, 368 U.S. 345, 82 S. Ct. 384, and *Ward* v. *U.S.*, 344 U.S. 924, 73 S. Ct. 494.) It is clear that this Court intended that "deliberate purpose" be an additional requirement to mere knowledge; it is equally clear that the existence of knowledge of a duty is prerequisite to the formation of a purpose or intent to avoid that duty.

Recognizing that it would cost more money to send notices by registered mail, and even more to send notices in which a return receipt is requested (in which the postman has the addressee or someone in his behalf, sign a receipt for the letter), the question is whether such effort should be required under law, to reduce the possibility of sending a man to jail when he swears that he never got the letter that the Draft Board sent to him, and never knew that he was supposed to appear at a certain time or place.

The use of a presumption by the Court of Appeals, to justify a finding that these Notices had been received by the petitioner, when there is absolutely no evidence in the record to show such receipt, raises substantial questions not only in the administration of the Selective Service laws, but also of criminal law generally. In current times, non-delivery and misdelivery of mail has become the subject of such wide-spread commentary, as to be deserving of judicial notice; and to say that a man should be jailed for not obeying a command in a letter which was sent to him by ordinary mail, when there is no proof that he received the letter, is to come perilously close to saying that the objective of saving costs in the use of registered mail justifies the possible jailing of innocent persons who never received the Draft Board letters.

In cases like the petitioner's, the deprivation of liberty without due process of law, becomes even more clear, since the evidence was that he was physically out of the United States both on the dates the critical notices were mailed to him, and on the dates for compliance with such notices. Since the Court of Appeals decision, which is sought to be reviewed, will no doubt be published one day, it will serve to encourage Local Draft Boards throughout the country to send notifications to the best address they have on file for a registrant, irrespective of whether that address is, or is not one at which the registrant can be reached. The decision below, nullifies this Court's decision in *Ward* and *Venus, supra.* The decision below eliminates the requirement of proof of knowledge of the notification and proof of intent to violate.

To all practical purposes, the decision below holds, that if a registrant doesn't leave a usable address with the Draft Board, he must suffer the same penalty for not obeying orders that he never received, as he would suffer if he had received them and deliberately disobeyed them.

If the Draft Board were without statutory remedy against a delinquent registrant, there might be some emo-

tional justification for eliminating proof of guilty knowledge in cases of non-compliance with specific orders; but since it is a separate criminal offense to fail to notify a Draft Board of a current address, the registrant can be charged under that provision of law. It is submitted that in the instant case, this respondent was charged with an offense he didn't commit (willful violation of a Draft Board order), simply because no one took the trouble to indict him for failure to notify the Draft Board of a current address.

The Court of Appeals was also asked to pass on a troublesome question not passed upon by the Supreme Court, but which has been the subject of lower court decisions, to wit, *Brede* v. *U.S.*, 396 F.2d 155, 9th Cir. 1968; *Cupit* v. *U.S.*, 292 F. Supp. 146 (D.C. Wis. 1968), and *U.S.* v. *Smith*, 291 F. Supp. 63 (D.N.H. 1968). This issue also is one of nationwide applicability. Draft Board members vote only upon the classification of a registrant. They leave to the Draft Board clerks the function of determining *when* registrants are to be called for physical examination, and *when* they are to be called for induction. The regulations set up a procedure that the Draft Board (and its clerks) is to follow in establishing priority of induction. Everyone hopes that the clerks will follow the priorities; and this hope is expressed in the view of the Court of Appeals that the action of the clerks, therefore, is purely ministerial. If it is purely ministerial, and involves no element of discretion, it is not necessary to have a meeting of the Draft Board to vote on whether to send a notice to report for examination, or whether to order a man to report for induction. But as the cited cases show, the action of the Draft Board clerks does, in fact, involve a measure of discretion. Names of some registrants are removed for further study; every name that is removed for further study requires that the next registrant in line move forward to take his place; and discretion is necessarily involved in such questions as to whether or not to pull a registrant's name out of its usual turn, etc. Such actions, by deferring some, accelerates the induction of others.

This is well illustrated in the case of *U.S.* v. *Smith, supra.* This Court should pass upon the question as to whether the Draft Board, by classifying a registrant in 1-A, frees itself from the duty of further dealing with the sequence or order of a registrant's appearance for physical examination, or appearance for induction. This Court should decide whether the Local Board may delegate to Draft Board clerks the authority to issue orders whose violation will result in criminal penalties.

No single law with both criminal and non-criminal sanctions covers as many people so importantly as do the Selective Service laws. No single area of administrative control over the liberties of Americans, has been the subject of so much contention as the actions of Local Boards throughout the country, which have been likened to Fiefdoms.

The issues raised in this petition involve the right of individuals to know in fact of Draft Board orders, so they may consciously choose between joining the Military Services, or going to jail,—and the petitioner in this case has been sentenced to jail without being offered this choice.

The petition raises, also, the question whether such vital orders, compliance with which materially alters the course of a man's life, and disobedience to which sends him to jail, may be delegated by members of the Local Board (who are appointed by the President) to clerks of the Board.

The decision below ought not to be permitted to stand, for it violates the fundamental rights of this Selective Service registrant; unreversed, it threatens to sanction similar deprivations of rights for other registrants.

Respectfully submitted,

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(APPENDIX)

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 224—September Term, 1968.

(Argued December 10, 1968 Decided January 28, 1969.)

Docket No. 32628

UNITED STATES OF AMERICA,

Appellee,

against

CHARLES FRANCIS DENARVAEZ,

Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of conviction, after a trial in the District Court for the Southern District of New York, before Dudley B. Bonsal, *Judge,* sitting without a jury, on one count of knowing failure to appear for an Armed Forces physical examination and on one count of knowing failure to report for induction. 50 U.S.C. App. § 462(a).

Affirmed.

ELMER FRIED, New York, N. Y. (William P. Volin, New York, N. Y., on the brief), *for Appellant.*

ELKAN ABRAMOWITZ, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., Andrew M. Lawler, Jr., and Charles P. Sifton, Assistant United States Attorneys, on the brief), *for Appellee.*

MOORE, *Circuit Judge:*

Charles Francis DeNarvaez (appellant) appeals from his conviction, after a trial without a jury in the District Court for the Southern District of New York, on one count of knowing failure to appear for an Armed Forces physical examination on April 3, 1962, and on one count of knowing failure to report for induction on February 13, 1963. 50 U. S. C. App. § 462(a). He was acquitted on one count of failure to appear for physical examination on March 6, 1962.

He was sentenced to six months' imprisonment on the first count and to eighteen months' on the second, but execution of the latter sentence was suspended. A probationary term of eighteen months was imposed to begin at the expiration of the prison term.

The record indicates that appellant was born in the United States on October 5, 1937. His mother was an American citizen and his father a citizen of Colombia, South America. At age two months, he was taken by his parents to live in Bogota, Columbia where he remained continuously until 1955, when he returned to this country to attend a military preparatory school in Virginia. His parents stayed in Bogota.

In September, 1956 the family moved to Pelham, New York and thereafter appellant registered with the Local

Selective Service Board. Upon graduating from Pelham High School in 1957, appellant entered the University of Miami and advised his Board accordingly. For approximately a year and a half after he had graduated from high school and while he was in college, he was classified 1-A. In January, 1959 he was given a student deferment which he retained until his graduation in January, 1962.

On February 7, 1962 appellant was re-classified 1-A and on February 23rd a notice to report on March 6, 1962 for physical examination was sent to him at his parents' address in Pelham. However, on February 12th appellant had left the United States for Bogota, having failed to notify his Board of his departure. His parents brought the notice to report of a physical examination to his attention and shortly thereafter on March 3rd, he wrote to the Board from Bogota that he expected to remain in Colombia for about three weeks longer and that he would like an extension until he returned "or else if possible be examined by a doctor from the United States Embassy or by my own doctor." He also indicated when he returned that he would be living at Navarre Avenue, Coral Gables, Florida and not in Pelham.

On March 5th, the Board responded that his physical examination would be re-scheduled "sometime during April." The Board mailed this letter to the address in Bogota which appellant had furnished in his March 3rd letter.

Thereafter, relying on appellant's letter indicating his return in three weeks from Bogota, the Board on March 22, 1962 mailed a notice to report for physical examination on April 3, 1962 to the Navarre Avenue address in Coral Gables. Appellant failed to appear and this failure to report constituted the basis for one of the counts in the indictment.

Appellant contends that there was insufficient evidence to sustain a conviction on this count because he was not in the United States on April 3, 1962 when he was to report. In fact, he did not come back to this country until April 14th, remaining only nine days until April 23rd, when he

returned to Bogota where he stayed continuously until January 18, 1966. Appellant asserts further that he did not receive the Board's response to his March 3rd letter requesting postponement of his physical examination nor the order to report therefor. Neither of these letters was returned to the Board.

The Government asserts that proof that a letter properly directed was placed in a mailbox creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Hagner* v. *United States*, 285 U. S. 427, 430 (1932); *United States* v. *Davis*, 390 F. 2d 879 (2d Cir. 1968). Thus, the Government argues that appellant must have received the response from the Board to his request for postponement of his March 6th physical examination because it was sent to a Bogota address which he had furnished to the Board.

Inasmuch as it indicated that he was to be re-scheduled for physical examination "sometime in April," he was put on notice that an order to report for examination would be sent to the Navarre Avenue address in Coral Gables. While it is true that the Board mailed the notice to report to appellant at a time when it knew he was in Bogota and while it is also apparent that appellant returned to the United States after the date on which he was to report, it is nonetheless proper to conclude that on his arrival he discovered that he was to have gone for a physical examination on April 3, 1962 because the Board's letter was never returned. Aware that he had that responsibility, it became his continuing duty to so report. 32 C. F. R. § 1628.16(b). His return to Bogota on April 23rd, after his nine days' stay in the United States, and his failure to notify his draft board clearly indicate that, knowing he had duties to the Board, he chose to ignore them. He can, therefore, reasonably be charged with knowing failure to report for physical examination on April 3, 1962.

As was indicated above, appellant went back to Bogota on April 23, 1962 and remained there continuously until

he returned to the United States January 18, 1966. In the meantime, because he failed to appear as ordered on April 3, 1962 his Board attempted to locate him and on April 9, 1962 it sent a letter to the Navarre Avenue address to inquire why he did not appear for his physical. The Board's letter was not returned and appellant claims not to have received it.

On August 22, 1962 the Board again wrote appellant at the Navarre Avenue address ordering him to report for physical examination. This letter was returned to the Board with a stamp "moved—left no address," above which was written "S. America." The Board remailed the order to his family's address in Pelham but it was returned again. A clerk from the Board then called the Pelham home and was informed that the DeNarvaez family had moved to Sevilla Avenue in Coral Gables. This information was recorded in appellant's file at the local board.

On September 18, 1962 the Board mailed an order to report for induction on October 9, 1962 to the Sevilla Avenue address. On October 16th, the Board wrote again to the Sevilla address to inquire why appellant did not appear for induction, declaring that "it is imperative that you inform this office immediately." No answer was forthcoming and the letter was not returned to the Board.

On January 2, 1963 the Board unanimously declared appellant delinquent and wrote him on January 8th at the Sevilla address of that decision. On January 18th, the Board ordered him to report for induction on February 13, 1963 by mailing the notice to the Pelham address. The letter was never returned to the Board and his failure to report constituted the basis for the last count in the indictment which resulted in a second verdict of guilty.

Appellant contends that there was insufficient evidence to sustain a conviction on this count because there was "no evidence whatsoever that [he] had knowledge of or ever received the notice ordering him to report on that day." He argues that the notice to report was sent to an

address where he no longer resided and, moreover, to an address where the Board knew he no longer resided. He asserts further that he was in Bogota all this time.

The Government, however, contends that appellant's conviction for knowing failure to report for induction on February 13, 1963 is based on sufficient evidence because appellant took the stand and denied ever having received any of the Board's letters after March 3, 1962. This being an issue of credibility, the trial court, uniquely situated to resolve it, could find that his claim was untrue.

If there were only one letter, perhaps we could credit the claim that it went astray. But as indicated above, there are too many notices unaccounted for. Appellant was declared a delinquent and the Board wrote him at his family's Sevilla Avenue address. He testified he did not receive this, stating that this was a "temporary" address of his parents. It turned out that his parents own the house and have owned and lived in it for some years. Additionally, the Board in May, 1963 mailed to appellant in Bogota an order to report for induction within fifteen days in the Canal Zone. Appellant failed to respond or report.

The trial court was, therefore, justified in finding that appellant had received notice of his duty to report for physical examination and for induction and that he knowingly failed to do so.

There is no merit to appellant's further claim that the orders to report for a physical examination and for induction were invalid because not authorized by the entire Board. There is evidence in the record to show that the Board did vote on appellant's reclassification to 1-A and on its finding that he was delinquent. It was also uncontroverted that appellant was called in the regular order. The steps between reclassifying appellant and calling him and those that followed the finding that he was delinquent were ministerial, and did not require the action of the entire Board.

The decision below is affirmed.

Order Denying Motion for Rehearing

32628

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

v.

CHARLES FRANCIS DENARVAEZ,

Defendant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

LEONARD P. MOORE
J. JOSEPH SMITH
Circuit Judges

I dissent and would grant a rehearing.

PAUL R. HAYS
USCJ by LPM

April 23, 1969

Judgment of District Court

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF NEW YORK

No. 66 Cr. 525

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES FRANCIS DENARVAEZ,

Defendant-Appellant.

On this 16th day of May, 1968, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty by the Court, defendant having waived trial by jury, has been convicted of the offense of a registrant under the Universal Military Training and Service Act, unlawfully, wilfully and knowingly failing, neglecting and refusing to appear for and to submit to the examinations required to determine his acceptability for military service; unlawfully, wilfully and knowingly failing, neglecting and refusing to report for induction into the Armed Forces of the U.S. (Title 50, Appendix, U.S. Code, Section 462(a) as charged in counts 2 and 3 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing

to this Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months on count 2. Eighteen (18) months on count 3. Execution of sentence on count 3 suspended. Defendant placed on Unsupervised probation for a period of eighteen (18) months, to commence upon expiration of confinement imposed on count 2, subject to the standing probation order of this Court.

Defendant continued on present bail and is to post bail pending appeal fixed at $5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dudley R. Bonzal
United States District Judge

John J. Olea
Clerk

Relevant Statutes
Title 50 Appendix, United States Code § 462(a)

§ 462. Offenses and Penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a

party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any matter shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. . . .

32 Code of Federal Regulations

1628.16. Duty of Registrant to Report for and Submit to Armed Forces Physical Examination.—(a) When the local board mails to a registrant an Order to Report for Armed Forces Physical Examination (SSS Form 223), it

shall be the duty of the registrant to report for such examination at the time and place fixed in such order unless, after the date the Order to Report for Armed Forces Physical Examination (SSS Form 223) is mailed and prior to the time fixed therein for the registrant to report for his armed forces physical examination, the local board cancels such Order to Report for Armed Forces Physical Examination (SSS Form 223) or postpones the time when such registrant shall so report and advises the registrant in writing of such cancellation or postponement.

(b) If the time when the registrant is ordered to report for armed forces physical examination is postponed, it shall be the duty of the registrant to report for armed forces physical examination upon the termination of such postponement and he shall report for armed forces physical examination at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for armed forces physical examination when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for armed forces physical examination to his local board and to each local board whose area he enters or in whose area he remains.

(c) Upon reporting for armed forces physical examination, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported to the location where his armed forces physical examination will take place, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for armed forces physical examination, (3) to appear for and submit to such examination as the commanding officer of the examining station shall direct, and (4) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported on his return trip from the place where his armed forces physical examination takes place.

32 Code of Federal Regulations

1632.14 Duty of Registrant to Report for and Submit to Indction.—(a) When the local board mails to a registrant an Order To Report for Induction (SSS Form 252) or an Order for Transferred Man To Report for Induction (SSS Form 253), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is found not qualified for induction, to follow the instructions of the representatives of the Armed Forces as to the manner in which he will be transported on his return trip to the local board.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1417

CHARLES FRANCIS DENARVAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 407 F.2d 185.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. A petition for rehearing was denied on April 23, 1969. The petition for a writ of certiorari was filed on May 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for knowingly failing to report for a physical examination and induction into the Armed Forces.

2. Whether the orders to report were void because notices of the orders were sent to petitioner by the draft board clerk without specific directions from the board members.

STATEMENT

A three-count indictment filed in the United States District Court for the Southern District of New York charged petitioner with failing to report for an Armed Forces physical examination on March 6 and April 3, 1962 (counts 1 and 2), and failing to report for induction on February 13, 1963 (count 3), in violation of 50 U.S.C. App. 462(a). After a jury-waived trial, petitioner was acquitted of count 1 and convicted of counts 2 and 3. On May 16, 1968, he was sentenced to imprisonment for six months on count 2 and unsupervised probation for eighteen months on count 3, the sentences to run consecutively. The court of appeals affirmed.

The evidence showed that petitioner was born in Bethlehem, Pennsylvania, on October 5, 1937. His mother was an American citizen and his father a citizen of Colombia (Tr. 45). Shortly after his birth, petitioner was taken by his parents to Bogota, Colombia. He remained there continuously until 1955, when he entered a military preparatory school in Staunton,

Virginia (Tr. 46). In 1956, petitioner's parents moved to Pelham, New York, and petitioner transferred to a high school in Pelham. He registered with Local Board No. 10 in Pelham prior to his graduation from high school in 1957 (Tr. 67).

After graduation, petitioner enrolled at and attended the University of Miami, in Coral Gables, Florida, and advised his local board accordingly. He received a student deferment until his graduation in January 1962 (Tr. 15-17). On February 7, 1962, petitioner was reclassified I-A. On February 23, a notice to report on March 6 for a physical examiation was sent to his home of record in Pelham (Tr. 23). Petitioner failed to report because he had left the country on February 12 for a trip to Bogota. Upon learning of the board's notice, petitioner, on March 3, 1962, replied to the board by letter from Bogota. He indicated that he had left the United States on a tourist visa to visit relatives; that he planned to remain out of the country for another two weeks; that when he returned he would be residing at 260 Navarre Avenue, Coral Gables, Florida; and that he desired an extension of the date for undergoing the physical examination (Tr. 25-26). The board immediately sent a letter to petitioner's Bogota address, informing him that he would be rescheduled for a physical examination in April (Tr. 26). The letter of March 3, 1962, was the last communication received from petitioner until his arrest four years later.

On March 22, 1962, the local board mailed petitioner a notice to report for a physical examination

on April 3. The letter was sent to the Navarre Avenue address in Coral Gables. Petitioner failed to report or respond. According to his uncontradicted testimony, he returned to the United States on April 14, and then left for Bogota again nine days later, without contacting the board (Tr. 71). He remained in Bogota until January 1966. In the meantime, the board, unaware of petitioner's location, sent a letter to the Navarre Avenue address, dated April 9, 1962, asking why he did not report. The letter was not returned. On August 22, 1962, the board again sent a notice to report for a physical examination to petitioner at the Navarre Avenue address. This letter was returned to the board with the notation that petitioner had moved and had not left a forwarding address (Tr. 27, 34). The board then remailed the notice to his family's address in Pelham, but it was again returned. Information was obtained from an individual residing at the Pelham address that petitioner's family had moved to 1228 Sevilla Avenue, Coral Gables, Florida. On September 18, 1962, the board mailed an order to report for induction on October 9, 1962, to the Sevilla Avenue address. Neither this letter nor a follow-up letter mailed on October 16 was returned, but petitioner failed to report as directed (Tr. 29-32).

On January 2, 1963, the board declared petitioner a delinquent, and sent a letter dated January 8 to the Sevilla Avenue address informing him of that action. The letter was not returned. Since all of the letters to Goral Gables had proved unproductive, the board, on January 18, 1963, mailed to the Pelham,

New York, address a notice to report for induction on February 13. This letter was never returned, but petitioner failed to report (Tr. 38-39). The next attempt to order petitioner to report for induction came in May 1963. This letter was mailed to Bogota. Petitioner failed to respond or report as ordered.

Petitioner, testifying at trial, denied receiving any of the local board's notices after March 1962 (Tr. 55-57). He stated that his parents lived in Pelham until 1961 or 1962, but then leased their house and moved to Coral Gables and thereafter to Bogota (Tr. 71-73). He admitted that his parents owned a home at 1228 Sevilla Avenue in Coral Gables, had been living there off and on for a number of years, and were residing there at the time of trial. Petitioner insisted, however, that this was only a temporary residence (Tr. 71, 76-77). He denied any intent to avoid submission to the directives of the Selective Service System (Tr. 78).

ARGUMENT

1. The primary basis of petitioner's contention that the evidence was insufficient to support his conviction is that there was no showing that he actually received the orders to report for a physical examination and induction after March 3, 1962. Whether or not the notices were sent, petitioner urges, his unrefuted testimony that he did not receive them requires reversal of his convictions for a knowing failure or neglect to perform duties prescribed by the Selective Service Act.

Although the government could not show receipt of the notices by direct evidence, the facts and circum-

stances adduced furnished adequate ground for belief beyond a reasonable doubt that petitioner knew he was required to notify the local board of his changes of address but did not, that he knew the board desired him to undergo a physical examination, and that he realized that the logical result of his inaction after a period of months was induction as a delinquent. The evidence of the numerous unreturned letters and petitioner's conduct throughout the entire period amply supports the element of scienter. Proof of actual receipt of an order is not essential to a finding that petitioner "knowingly" failed to comply with the duty which it prescribed. *Stiles* v. *United States*, No. 74, 1968 Term, certiorari dismissed as improvidently granted, 393 U.S. 219. Congress plainly did not contemplate that an individual could escape prosecution by placing himself beyond the reach of the process by which the board ordinarily communicates its notices and orders and then claiming that he did not receive them. See *Moorman* v. *United States*, 389 F.2d 27 (C.A. 5); 32 C.F.R. 1641.3.

Petitioner attacks the lower courts' partial reliance upon the long-standing presumption that an unreturned letter has reached its destination and has been received by the addressee. See *Hagner* v. *United States*, 285 U.S. 427, 430. He suggests that nowadays many letters are misdelivered or nondelivered. The volume of letters reaching their addressees, however, is still undoubtedly an overwhelming proportion of the vast amount of mail moving through the United States postal system. The presumption of delivery remains sound and rational, even though an occasional

letter might go astray. In petitioner's case particularly, the suggestion that not one of the unreturned letters sent by the board reached petitioner taxes credulity. The trial judge, as fact finder, had strong reason to reject petitioner's testimony to that effect.[1]

2. Petitioner challenges the validity of the orders to report on the ground that they were issued by the clerk rather than by the members of the draft board. This argument overlooks the distinction between the order itself and the form in which it is communicated to the registrant. The evidence at trial showed that the members of the local board had voted on the reclassification of petitioner to I-A following his graduation from college and on its subsequent determination that he was delinquent. In addition, the coordinator of the local board testified that petitioner was notified to report in the regular order of call. The steps between reclassifying and determining that petioner was a delinquent were largely ministerial. Selective Service regulations specify in precise detail the order in which the local board must call up men to fill its quota. 32 C.F.R. 1631.7(a). Once petitioner was declared a delinquent by the board, his inclusion in the call was mandatory. The fact that the acts of communicating the orders to petftioner were per-

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[1] *Venus* v. *United States*, 368 U.S. 345, reversing 287 F.2d 304 (C.A. 9), and *Ward* v. *United States*, 344 U.S. 924, reversing 195 F.2d 441 (C.A. 5), the cases relied upon by petitioner (Pet. 7), are distinguishable on their facts. In *Ward* this Court found "[t]he record does not support the charge that, during this period, there was deliberate purpose on the part of petitioner not to comply with the Selective Service Act or the regulation issued thereunder."

formed by the clerk of the board hardly qualifies as a defense to prosecution for failing to report, especially where, as here, no prejudice has been shown. See Brief for the United States in *Stiles* v. *United States*, No. 74, 1968 Term, certiorari dismissed as improvidently granted, 393 U.S. 219, pp. 29-32; *United States* v. *Crowley*, 405 F.2d 400 (C.A. 4), certiorari denied, 394 U.S. 904; *Mason* v. *United States*, 218 F.2d 375, 377 (C.A. 9); *Kalpakoff* v. *United States*, 217 F.2d 748, 749-750 (C.A. 9), certiorari denied, 348 U.S. 982; *Kent* v. *United States*, 207 F.2d 234 (C.A. 9); *Smith* v. *United States*, 157 F.2d 176, 181-182 (C.A. 4), certiorari denied, 329 U.S. 776; *United States* v. *Fratrick*, 140 F.2d 5, 6-7 (C.A. 7); and the cases cited by petitioner (Pet. 9).[2]

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[2] As noted previously (*supra*, p. 4), petitioner was declared a delinquent by his local board in 1963. He makes no challenge to the validity of the delinquency regulations, however. Such an attack is involved in *Gutknecht* v. *United States*, No. 1176, 1968 Term, in which certiorari was granted on April 28, 1969, but in a rather different context. Moreover, the validity of the delinquency regulations is at issue in a direct appeal taken by the government from the granting of a motion in arrest of judgment in *Eisdorfer* v. *United States*, No. 67 CR 302, E.D. N.Y. (decided April 18, 1969). But since petitioner makes no claim in this regard, and since the delinquency procedure played a wholly insignificant part in the instant case, we perceive no sound reason for awaiting the outcome of *Gutknecht* and *Eisdorfer* before acting on this petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.

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